IN THE

Supreme Court of the United States

October Term, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN, FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and HELEN L. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of Health, Education and Welfare of the United States, and HAROLD HOWE, 2d, as Commissioner of Education of the United States,

Appellees.

REPLY TO MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16 of the Rules of this Court, appellants submit this reply to the appellees' motion to dismiss or affirm.

This reply is addressed solely to the assertion, on pages 5-7 of appellees' motion, that the appellants "seek a broad ruling as to all Federal grants under Titles I and II of the Elementary and Secondary Education Act," and that

"[t]he complaint does not allege that any particular local agency, any place in the country, has or may present an unconstitutional program." Appellees conclude that appellants are asking this Court to consider "each and every State and local program submitted for approval under Titles I and II."

1. The above argument misconstrues the factual issues upon which the three-judge district court, on May 25, 1967, heard defendants' motion to dismiss. On May 10, 1967, some two weeks before oral argument of defendants' motion, all parties to this lawsuit were present at a pre-trial conference held by District Judge Marvin E. Frankel. Among other things, Judge Frankel sought to limit the factual issues in order to facilitate a trial. At the conference, the attorney for the plaintiffs agreed to limit the complaint so that the only issue before the three-judge court would be the constitutionality of Title I and Title II as these titles had been construed and applied by defendants to certain educational programs now in effect in New York City. Judge Frankel agreed that this was a desirable and fair way to limit the litigation, and from that time on the case was posited on the assumption that only Title I and II programs existing in New York City were under consideration. Specific reference was made to the practices of sending teachers paid out of Federal funds to teach in the New York City parochial schools and supplying textbooks for use in those schools.

In oral argument before the three-judge court, the plaintiffs again stressed they were limiting their constitutional attack to certain programs now existing in New York City.

Mr. Pfeffer, attorney for the plaintiffs, said this before the court:

> If your Honor please, I am perfectly willing that this case be deemed a case against the City of New York, the Board of Education. The District of Columbia didn't defend that suit [*Bradfield* v. *Roberts*]. It was the government of the United States, Attorney General of the United States, not the attorney of the District of Columbia. If it will be necessary to paint this case in the same picture, I am perfectly willing.
>
> Even if it is necessary that jurisdiction be dependent upon making the City of New York a defendant in this case we are perfectly willing to do so.*

2. On a motion to dismiss, the complaint must be taken in its most favorable light. As this Court said in *Conley* v. *Gibson*, 355 U. S. 41, 45-46, 48 (1957)::

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.
>
> * * *
>
> Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. (Footnotes omitted.)

The appellants were at all times willing to amend their complaint if that were necessary to limit the trial to the practices in New York City, but, because the question of stand-

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* Stenographer's minutes of argument of Leo Pfeffer, page 17, *Flast* v. *Gardner*, 66 Civ. 4102, S.D.N.Y., argued May 25, 1967.

ing appeared to both the single judge conducting the pre-trial conference and the three-judge court to be a preliminary and separate question, no such amendment was made. Nor was it indicated that amendment would be necessary or that particularization could not be adequately effected through the usual pre-trial conference procedure.

Appellees admit that "[m]any decisions of this Court indicate that the varying details of programs approved under the Act will be of critical significance from a constitutional standpoint." Appellants, of course, agree, and go further: the constitutional challenge in this litigation has already been limited to the construction put on Titles I and II by the appellees when they approved New York City programs receiving aid under these titles and the issues therefore are sufficiently sharp, tangible, and direct for this Court to take jurisdiction.

Respectfully submitted,

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September, 1967